

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1183

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To Be Argued By:

Andrew B. Bowman

DOCKET NO. 77-1183

UNITED STATES OF AMERICA,

APPELLEE,

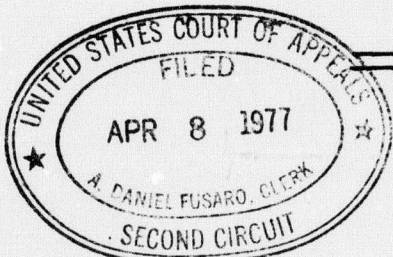
-VS-

MARGARET ROBINSON,

APPELLANT.

On Appeal From The United States District Court
For The District of Connecticut

BRIEF FOR APPELLANT MARGARET ROBINSON



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STATEMENT OF THE ISSUES

1. Was the present double jeopardy issue, although not mentioned in this Court's decision in United States v. Newman, nonetheless resolved there?

2. Are further proceedings in this case barred by the Double Jeopardy Clause because there was no manifest necessity for the reconstitution of the original jury, the appellant did not consent or contribute to the declaration of mistrial and because reconstitution of the jury was not intended for her benefit?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1183

UNITED STATES OF AMERICA,

APPELLEE,

-vs-

MARGARET ROBINSON,

APPELLANT.

BRIEF FOR APPELLANT MARGARET ROBINSON

STATEMENT

This is a direct appeal under United States v. Alessi, 544 F.2d 1139 (2d Cir. 1976), and United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975), from an order of the Honorable Jon O. Newman, United States District Judge, denying Margaret Robinson's motion to dismiss the indictment on Fifth Amendment Double Jeopardy grounds.

On April 21, 1976, a federal grand jury in New Haven returned a two-count indictment charging Margaret Lee Robinson with embezzlement of \$1,779 from a federally-insured bank in violation of 18 U.S.C. §656 (Count I) and Jethro Brown, Patricia Saverese, and Margaret Lee Robinson with conspiracy to commit that offense in violation of 18 U.S.C. §371. App. 9-11. On June 21, 1976, jury selection commenced in the trial of Margaret Robinson and Patricia Saverese. Brown had previously pleaded guilty. Following challenges for cause the panel was excused by agreement of counsel, since the panel had been in attendance at the courthouse since early that morning. When the government peremptorily challenged all four available Black veniremen, appellant moved to expunge the government's challenges on the ground that the government was systematically and unlawfully excluding Blacks from juries. When Judge Newman asked the prosecutor whether he wished to state a nonracial reason for challenging the four Black veniremen, the prosecutor refused.

Since the trial was not scheduled to commence until late August, the trial judge instructed the Clerk to maintain the list of potential jurors with the challenges that had been exercised and took appellant's motion to expunge the government's challenges under advisement. The court also extended to both sides an invitation to file memoranda, to which procedure each attorney stated he had no objection. Appellant Robinson, upon motion duly filed, subsequently was granted

permission to examine court records in order to discover the existence and extent of the government's practice of excluding Negroes from the administration of criminal justice in the District of Connecticut by peremptory challenge.

On August 31, 1976, appellant Robinson filed a statistical analysis with the district court covering a two-year period from June, 1974, to June, 1976, covering 72 criminal jury trials, including the present case. On October 5, 1976, the government filed its own analysis of appellant Robinson's statistics, and on October 15, 1976, Judge Newman filed a memorandum of decision and order reinstating the Black veniremen to the panel and requiring the government to keep certain statistical reports, 421 F. Supp. 467. On October 26, Judge Newman granted the government's request for one more week to submit additional data and on November 4 denied the government's motion to reconsider. As part of that ruling, the district judge set November 29, 1976, as the date for completion of jury selection.

On November 29, 1976, five months after jury selection began, six weeks after the original decision reinstating the veniremen and over three weeks after the denial of the motion to reconsider, the government moved for a continuance on the ground that it was filing a petition for mandamus with this Court. Judge Newman made inquiry of the Clerk of the Court of Appeals to ascertain whether a mandamus

petition had in fact been filed, and none had been. App. 89 (Nov. 29, Tr. 28). In opposing the government's motion for continuance, Robinson's counsel suggested that jury selection resume, since the government would not be penalized by proceeding so long as the jury was not sworn that day. App. 80 (Nov. 29, Tr. 19). The judge, however, proceeded to swear a jury of twelve and two alternates. App. 98 (Nov. 29, Tr. 37). Two of the Blacks became jurors, and one remained in the jury panel along with the only two other veniremen who were not selected.

That afternoon this Court stayed further proceedings, and on January 25, 1977, issued a writ of mandamus which in substance reversed Judge Newman's October 15th order reinstating the Black veniremen. United States v. Newman, ____ F.2d ____, Slip Op. 1559. App. 12-35. On February 16, 1977, the Court of Appeals issued its mandate, which was received in the district court on February 23, 1977. The mandate directed further proceedings in accordance with the opinion of the Court of Appeals, which concluded as follows:

On remand the district court will afford the defendants the opportunity, in accordance with the suggestion by Judge Newman in open court on November 29, 1976, to proceed with the present jury after the three members, previously ordered onto the final panel by the district court, have been removed, and that the places of the discharged members of the jury panel be filled by the two remaining alternates, and that the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel.

In the event that the two defendants fail to agree on the above procedure, the cases will have to be severed. If the defendants do not elect to proceed as first suggested above, the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness.

Slip Op. at 1582; App. 35.

On March 7 Judge Newman held a hearing with both appellants and their counsel present to afford appellants the opportunity "to proceed with the [November 29th] jury" minus the two Black jurors who had been selected and sworn on November 29. United States v. Newman, supra, at 1582; App. 35. At the hearing appellant Robinson objected on Double Jeopardy grounds both to the partial discharge of the jury which was accomplished by the Court of Appeals order removing the two Black jurors and to the total discharge of the jury which was accomplished by this Court's mandate that if the appellant did not elect to proceed with an all-white jury, she would be compelled to suffer a mistrial. App. (March 7) 102-03, 106-07. Robinson specifically objected to the declaration of a mistrial. App. 115-16 (March 7, Tr. 16-17). Counsel were allowed one week to file memoranda in support of a motion to dismiss the indictment on double jeopardy grounds.

On March 14, 1977, Robinson filed her motion to dismiss and a memorandum in support of her claim that a second trial would place her twice in jeopardy in violation of the Fifth

Amendment. App. 36-37. On March 28, Judge Newman filed his decision denying Robinson's motion to dismiss. App. 38. On March 29, appellant Robinson filed a notice of appeal. App. 8. Judge Newman granted a brief stay, and appellant moved for a further stay pending appeal in this Court under Docket No. 77-8155. App. 48-56. The motion was argued April 5, 1977, before Oakes, Cir. J., and Wyzanski and Holden, D.JJ., who denied a further stay but expedited this appeal, requiring the appellants' briefs on the merits to be filed in three days. App. 60-61. No further proceedings have taken place in the district court. At appellants' request, the case has been temporarily removed from Judge Newman's jury selection list.

ARGUMENT

I. THE DOUBLE JEOPARDY ISSUE PRESENTED IN THIS APPEAL WAS NOT FINALLY DETERMINED BY THIS COURT'S ISSUANCE OF THE WRIT OF MANDAMUS IN UNITED STATES V. NEWMAN.

In opposition to the government's petition for a writ of mandamus in United States v. Newman, supra, the appellants (then respondents) argued that issuance of the writ would violate the Double Jeopardy Clause. Brief for Respondents, Dock. No. 76-3077, at 28-30. The government did not brief the issue at all. The Newman panel issued the writ without mentioning the double jeopardy objection. The panel's failure to dismiss the mandamus petition necessarily indicates that the Court felt the Double Jeopardy Clause posed no insurmountable obstacle to their action. Why it reached this tacit conclusion, however, is less than obvious. At oral argument of the motion for stay in this case, the government suggested that the panel must have rejected the double jeopardy argument on the merits, and proceeded to contend that this presumed rejection was therefore the "law of the case." Neither the premise nor the conclusion of this suggestion is sound.

It is very unlikely that this Court would propose to decide a novel constitutional issue without revealing its reasoning. Moreover, knowing that the defendants would raise the claim upon remand in the district court, if the panel had

truly reached a conclusion that the objection was not meritorious they would surely have said so, for reasons of judicial economy if nothing else. Much more probable is the explanation that the Newman panel believed the double jeopardy argument to be premature. Events might have unfolded so as to obviate the incipient problem. For example, the defendants might have been persuaded by the panel's reasoning and voluntarily accepted a reconstituted, all-white jury, or they might have elected to waive a jury entirely, or to change their pleas to guilty or nolo contendere. The defendants might also have decided to preserve their double jeopardy objection while declining to take interlocutory appeals, thereby preserving the possibility of an acquittal rather than a mere dismissal. Thus, the Newman Court probably treated the claim as not ripe, and took the prudent path of avoiding the unnecessary or anticipatory decision of constitutional issues.

Second, the double jeopardy issue before the Newman panel was not the same one presented here. Before, the question was whether the Court of Appeals could grant any conceivable relief without violating the Clause. See Fong Foo v. United States, 369 U.S. 141 (1962) (mandamus not available to cure erroneous acquittal); cf. United States v. Martin Linen Supply Co., ___ U.S. ___ (April 4, 1977), aff'g 534 F.2d 535 (5th Cir. 1976) (acquittal after jury deadlock not appealable). Now, the question is whether the events in the district court, as they

actually unfolded upon implementation of the prior mandate, App. 100-119 (March 7, 1977), have placed the defendants in such a position that further proceedings would constitute double jeopardy. The factual as well as the legal picture has changed and sharpened.

Even if the precise double jeopardy issue had been necessarily decided by the panel which issued the mandamus, however, this Court would not be bound by that determination. The "law of the case" doctrine is not an "inexorable" limitation on the court's power, but a "rule of public policy and of private peace." Johnson v. Cadillac Motor Car Co., 261 F. 878, 886 (2d Cir. 1919). If upon full consideration, including, for the first time, briefing from both sides, this panel concludes that implementation of the prior mandate placed the defendants in an unconstitutional situation, the "law of the case" doctrine would pose no barrier to issuing a ruling saying so. United States v. Fernandez, 506 F.2d 1200, 1203-04 (2d Cir. 1974).

II. THE FIFTH AMENDMENT'S PROTECTION
AGAINST DOUBLE JEOPARDY BARS
FURTHER PROCEEDINGS AGAINST THE
APPELLANT AND REQUIRES DISMISSAL
OF THE INDICTMENT.

The mandate of this Court in United States v. Newman instructed the district judge to inquire of the defendants whether they would accept a partial discharge of the jury impanelled and sworn on November 29, 1976, the replacement of two regular jurors by the alternates, and the filling of the alternate seats from the ranks of previously unsworn but unchallenged veniremen. Slip Op. 1582; App. 35. If the defendants declined this proposal--as they did--the district judge was directed to declare a mistrial. This appellate direction to discharge the jury (either partially or totally) came at the urging of the government, which petitioned this Court for a writ of mandamus.¹

Because there was no "manifest necessity" for the reconstitution of the original jury, and the appellant neither contributed nor consented to it, nor was she intended to benefit from it, trial by a different jury would "subject [her] for the same offense to be twice put in jeopardy of life or limb" in violation of the Fifth Amendment.

At the outset, it is clear that jeopardy attached on

1. The petition claimed that Judge Newman had exceeded his powers and disrupted the administration of justice in the selection of the jury, when, based on a statistical finding of systematic race-based peremptory exclusion of qualified Black veniremen, he disallowed four of the government's challenges.

November 29 when the district court ordered the jury sworn. Downum v. United States, 372 U.S. 734 (1963). The trial judge's decision to swear the jury was contrary to the suggestion of appellant Robinson. In opposing the government's motion for continuance, counsel stated:

MR. BOWMAN: ... There is a cost factor that the court has often pointed out to defense counsel, and finally if jeopardy doesn't attach because the jury is not sworn today, then how is the government penalized?

App. 80-81 (Nov. 29, Tr. 19-20.) This was not a case where a defendant was seeking to maneuver the government into an untenable position with respect to its petition for mandamus. Nor can it be argued that counsel in any sense precipitated the present double jeopardy situation by challenging the government's jury selection practices in the first place. Counsel had an obligation to raise in good faith a legal issue that could, to say the least, fairly be advanced for the defendant. ABA Code of Professional Responsibility EC7-1, DR 7-101; ABA Standards Relating to the Defense Function §7.2(a). The appellant had a concomitant Sixth Amendment right to have such arguments made on her behalf. In exercising that right to effective counsel, the appellant did not in any degree waive her Fifth Amendment right to be protected from double jeopardy. Cf. Simmons v. United States, 390 U.S. 377, 394 (1968) (Harlan, J.). The fact that jeopardy attached just prior to this Court's initial intervention in the case is thus in no way attributable to the appellant. Cf. United States v. Dinitz, 424 U.S. 600 (1976).

Jeopardy having attached, the question becomes whether the appellant consented to the mandated partial or total discharging of the November 29 jury. Appellant Robinson neither precipitated nor consented to the aborting of the original jury but rather objected to it. While the district court's ruling found implied consent, App. 43-45, it did so without any basis in the record. The mandate of the Court of Appeals presented one course to be "elected," that of assembling a recomposed, all white jury without the two Black members who were impanelled and sworn on November 29. The alternative was to suffer a court-ordered mistrial. Because both alternatives involved a reconstitution of the original jury, each amounted to a mistrial for purposes of double jeopardy analysis. See Wade v. Hunter, 336 U.S. 684 (1949); United States v. Potash, 118 F.2d 54 (2d Cir. 1941). To find consent to a mistrial under these circumstances is to find profound new meaning in Hobson's choice.²

It is abundantly clear from the court proceedings of November 29 and March 7 that this appellant neither asked for nor consented to the partial or total discharge of the November 29 jury. This appellant never asked for a mistrial. This appellant objected time and again to the declaration of

2. From the district court's point of view, of course, the appellant's refusal to accept a jury with two new members required it, in obedience to this Court's mandate, to declare the mistrial. United States v. Fernandez, 506 F.2d 1200, 1202-03 (2d Cir. 1974). This was the compulsion of higher judicial authority, however, not a choice of trial tactics by a litigant.

mistrial by Judge Newman on March 7. App. 112 (Mar. 7, Tr. 13). Further, objection was also made to the partial discharge of the jury, that is, the removal of two Black members, App. 102-07 (Tr. 3-8), the aborting of a "tribunal [the appellant] might have believed to be favorably disposed to [her] fate," United States v. Jorn, 400 U.S. 470, 486 (1971). It is difficult, if not impossible, to understand how anything this appellant did or said amounted to consent, express or implied.

This Court very recently declined to find such implied consent in United States v. Grasso, ____ F.2d ____ (March 9, 1977), Slip Op. 2247. There, the original trial judge concluded that because of the repudiated recantation of an important government witness, the defendant would not get a fair trial. Without hearing argument or expressly considering the alternatives, the court sua sponte declared a mistrial. Defense counsel said he agreed with all the judge had decided "except [the] decision to declare it a mistrial"; he never objected to the mistrial declaration. The appellant's position here is much stronger. Counsel cautioned against swearing the jury in the first place, warned of the double jeopardy danger again in opposition to the petition for mandamus, and, faced with a "choice" of two forms of mistrial, objected to both at every opportunity. See Grasso, supra, at 2264-67 (Timbers, J., dissenting) (clearer objection should be required).

The Newman mandamus panel certainly did not order the partial and total discharge of the jury in the interest of

appellant Robinson. Compare Gori v. United States, 367 U.S. 364 (1961), where a mistrial, declared sua sponte by a district judge who feared that the prosecutor's line of questioning was calculated to elicit information that would inform the jury of prior crimes committed by the accused, was held not to bar a second trial. Justice Frankfurter pointed out that the mistrial was intended "in the sole interest of the defendant." Id. at 369. This Court applied Gori's cui bono analysis, as well as the implied consent doctrine, in United States v. Gentile, 525 F.2d 252 (2d Cir. 1975), cert. denied, 425 U.S. 903 (1976). In Gentile, defense counsel persuaded the judge that the prosecutor had seriously prejudiced the defense by suggesting that the defendants would not contest the acts charged but rather would rely upon the defense of entrapment. Judge Friendly held the trial judge's decision to declare a mistrial was in the "sole interest of the defendant," citing Gori, and "within the permissible bounds of discretion." Id. at 258.

The government's decision to seek a joint trial in United States v. Glover, 506 F.2d 291 (2d Cir. 1974), which cost the government a mistrial on Bruton³ grounds, is the functional equivalent of the decision to petition for a writ of mandamus in this case. Glover's claim of double jeopardy at the second trial was upheld since the mistrial was not declared in his interest and the government's decision to hold a joint

3. Bruton v. United States, 391 U.S. 123 (1968).

rather than a separate trial for Glover precipitated their decision to ask for the mistrial. In the present case it was the government's petition that specifically asked for removal of the Black jurors, thus requesting an aborting of the jury and causing the resultant mistrial. The government's decision to vindicate its view of Fed. R. Crim. P. 24 may have won it the right to challenge Black veniremen without scrutiny by the district court, but that decision has precipitated the imminent violation of the Double Jeopardy Clause if a second trial is permitted to take place.

This case is also akin to United States v. Jorn, 400 U.S. 470 (1971). In Jorn, the Supreme Court ruled that the Double Jeopardy Clause barred a second trial where the first was aborted by the trial judge sua sponte out of concern not for the defendant, but for the perceived need of government witnesses to consult with their attorneys to avoid self-incrimination in testifying. In holding that the trial judge abused his discretion and that the mistrial was declared for the benefit of the witnesses, Justice Harlan contrasted the case with Gori, in which the Court had found no abuse of discretion and a sole benefit to the defendant in the sua sponte declaration of mistrial.

Jorn's materiality to this case rests also upon its reaffirmation that the double jeopardy clause protects a defendant against judicial as well as prosecutorial overreaching, Id. at 484, as first set forth in United States v. Perez,

9 Wheat. (22 U.S.) 579 (1824). Whether the mandated discharge of the jury was partial or total, there was no more manifest necessity for it than there was consent to it. Compare Wade v. Hunter, 336 U.S. 684 (1949), where only the exigencies of the wartime battlefield were held (6-3) to justify the discharge and later reconvening of a court martial. There was no hint that the two Black jurors ordered removed were biased in any way. Cf. Simmons v. United States, 142 U.S. 148 (1891).

This Court found to the contrary:

It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons, but have judged the facts on the evidence presented in court in light of the court's charge.

United States v. Newman, ____ F.2d ____, Slip Op. 1559, 1579 n.8; App. 32. Even assuming that there was error in Judge Newman's original decision which required correction by mandamus, it by no means follows that there was a "manifest necessity" to reconstitute the sworn jury in this case. Even the grossest errors at the prosecution's expense--of which Judge Newman's ruling cannot be said to be one, for it did not amount to a dismissal of the case or otherwise prevent a fair trial--must often go without correction in particular cases because of the overriding policies of the Double Jeopardy Clause. United States v. Martin Linen Supply, supra; Fong Foo, supra; United States v. Wilson, 420 U.S. 332, 351-52 (1975);

United States v. Means, 513 F.2d 1329, 1332 (8th Cir. 1975). There is no more "necessity" for a new trial here than in any average criminal case where the district judge commits a serious trial error deemed unfavorable by the government.⁴

Moreover, the aborting of the jury was not accomplished by the exercise of district court discretion in the difficult crucible of trial, but rather by the mandate of this Court upon petition of the government. The issuance of the writ removing the Black jurors was at the insistence and in the supposed interest of the government. The present double jeopardy issue has arisen as the Supreme Court warned in Will v. United States, 389 U.S. 90, 96 (1967), because appeals by the government, like the petition filed in this case, "always threaten to offend the policies behind the double jeopardy prohibition."

The "demands of public justice" did not require the discharge of the jury selected and sworn in this case. The only such demand came from a government petition alleging legal error in jury selection while disavowing the existence of bias or prejudice on the part of any juror. But at its heart:

The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional

4. Compare Illinois v. Somerville, 410 U.S. 458 (1973). Were the appellant to have been convicted by the November 29 jury, she certainly could not have claimed that the composition of that panel constituted prejudicial error. Thus, the verdict could not have been "upset at will by one of the parties." Id. at 471.

policy of finality for the defendant's benefit in federal criminal proceedings.

United States v. Jorn, supra, 400 U.S. at 479. Margaret Robinson had a right to have the jury of November 29 unreconstituted by removal of two of its members. The underpinning of the double jeopardy clause rests upon an accused's right "of being able, once and for all, to conclude [her] confrontation with society," Jorn, supra at 486. On March 7 Ms. Robinson poignantly expressed the frustration and anxiety of an accused person confronted by the prospect of being placed in jeopardy once again:

DEFENDANT ROBINSON: Is the same thing going to happen again? If you pick another jury and come back they are going to throw the Black people off and have an all white jury, and we will keep opposing it. How long will that go on?

App. 113 (Mar. 7, Tr. 14.) The Fifth Amendment's answer to the appellant's question is that it will go on no longer.

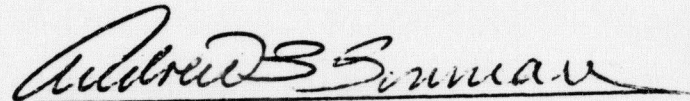
III.

Pursuant to Fed. R. App. P. 28(i), the appellant Robinson joins in the arguments of co-appellant Saverese, insofar as they are applicable to Ms. Robinson's case.

CONCLUSION

The ruling of the district court should be reversed and the indictment dismissed on the basis of the Fifth Amendment's protection against double jeopardy.

Respectfully submitted,



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Dated: April 8, 1977

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CERTIFICATION

I hereby certify that two copies of the foregoing Brief and Appendix for Appellant Margaret Robinson, were hand-delivered to Michael Hartmere, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, and I mailed two copies to the Honorable Thomas J. Meskill, United States Circuit Judge, United States Post Office, West Main Street, New Britain, Connecticut, 06050, this 8th day of April, 1977.



